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January 2, 2020

VIA E-FILING

The Honorable Jocelyn Boyd
 Executive Director and Clerk
 South Carolina Public Service Commission
 101 Executive Center Drive
 Columbia, SC 29210

RE: South Carolina Energy Freedom Act (H.3659) Proceeding to Establish
 Standard Offer, Avoided Cost Methodologies, etc.
 Docket Nos. 2019-184-E, 2019-185-E and 2019-186-E

Dear Ms. Boyd:

Comments

Commissioner Tom Ervin has conducted himself within the standards of the Code of Judicial Conduct and the resulting controversy over Commissioner Ervin's communications with the Conservation Voters of South Carolina ("CVSC") is unjustified and undermines the public's confidence in our system of government under law.

Commissioner Ervin's email of December 13, 2019 was permitted by the South Carolina Code of Judicial Conduct. Public Service Commissioners are quasi-judicial officers and are subject to the Code of Judicial Conduct. S.C. Code Ann. Section 58-3-260. The Code of Judicial Conduct provides for nonpublic comment in certain circumstances such as those before us now. Commissioner Ervin received an email from CVSC December 13, 2019.¹ The email was circulated among 19,232 supporters of the CVSC, including Commissioner Ervin. There is no dispute that the CVSC email to Commissioner Ervin constitutes an ex parte communication and that the communication was inadvertent. However, the CVSC email alleges that Commission Order 2019- 847 created a "doomsday scenario" for South Carolina Ratepayers; that the order "slashed" payments to solar producers by 33% and limited purchased power agreements to ten years instead of twenty years; and that CVSC had been instrumental in getting legislators involved in this matter. Commission Ervin replied to the sender of the CVSC email summarizing his concurring opinion to Commission Order No. 2019-847. For instance, he

¹ The CVSC is not a party to the avoided cost dockets.

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responded to the allegation that the Commission “slashed” rates by summarizing the Commission’s action in setting “avoided cost rate.” Commissioner Ervin further summarized his concurring opinion which explained the Commission’s reasoning for limiting the term of power purchase agreements to the statutory ten-year term. See Order No. 2019-847 at pp.102-104.² Commissioner Ervin further explained that anticipated developments in battery storage will advance solar energy in South Carolina³ and that the biennial review of avoided costs will allow South Carolina’s avoided cost rates to remain current.⁴ Commissioner Ervin’s email faithfully summarized his concurring opinion, a matter of public record. Where Commissioner Ervin stated matters beyond the four corners of his concurring opinion, he merely stated incontrovertible facts.

Canon 3.B(9) the Code of Judicial Conduct authorizes public comment by a judicial officer while a proceeding is pending and provides in its relevant part as follows:

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing....”

It cannot reasonably be argued that Commissioner Ervin’s carefully crafted email will have any impact on the pending avoided cost proceedings.

In both avoided cost proceedings in Docket Nos. 2019-184-E, 2019-185-E and 2019-186-E, the Commission afforded the parties due process. The parties of record were ably represented by counsel and were given considerable latitude by the Commission to present their cases. The record is voluminous. At the agenda meeting at which the Commission published its decision in these dockets, the Commission invited the parties to inform the Commission of any errors of law or fact in post-trial petitions. At this writing, every party has been given ample opportunity to present its case. Given the Commission’s fundamental fairness to the parties in this proceeding, nothing Commissioner Ervin wrote can reasonably be expected to affect the outcome of this proceeding or interfere with his (and the Commission’s) ability to continue to give the parties a fair hearing. Moreover, because Commissioner Ervin’s facts set out in his email are either supported by the record or incontrovertible, the record is devoid of any discernable bias on Commissioner Ervin’s part. *Felder v. Charleston County School District*, 327 S.C. 21, 489 S.E.2d 191 (1997).

However, it must be noted that the CVSC email was not as reasoned as Commissioner Ervin’s response. The CVSC email raises questions concerning the Commission’s conduct in

² Order No. 2019-847 dated December 9, 2019 had been published of record by that time.

³ Cf. Docket No. 2019 -393 – E, Application Dominion Energy South Carolina, Incorporated for Approval of "Storage Tariff.

⁴ S.C. Code Ann. Section 58-41-20(A)

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these dockets. It was in this context that Commissioner Ervin attempted to explain his rationale for joining the majority. The Code of Judicial Conduct permits a judge to make public comment and here, permitted Commissioner Ervin to respond to the allegations in the CVSC email concerning his or the Commission's conduct in these proceedings.⁵ In so doing, Commissioner Ervin faithfully summarized his concurring opinion or stated incontrovertible facts. Confidence in our system of government is best served by permitting judges to respond to allegations concerning their conduct in a pending matter.⁶

Moreover, ratemaking is a legislative function whether exercised by the legislature directly or by an administrative body under delegated authority. *Berry v. Lindsay*, 256 S.C. 282, 182 S.E.2d 78 (1971). The General Assembly has delegated this legislative function to the Public Service Commission. Even though the General Assembly has seen fit to require Public Service Commissioners to comply with the Code of Judicial Conduct, the Public Service Commission discharges a legislative function when setting rates. Inherent in the legislative function is the duty to educate South Carolina ratepayers with respect to the Commission's orders. Commissioner Ervin's carefully composed email served to educate the CVSC and its supporters of the meaning and impact of Commission Order No. 2019-847 and was permissible as a legislative function.⁷

Accordingly, Commissioner Ervin has acted in conformity of the standards of the Canons of Judicial Conduct and his email was permitted by State Law. For the reasons set out, his recusal is not justified, and the public's confidence in our system of government under law is best served if Commissioner Ervin continues to participate in these dockets.

⁵ ABA Model Rule 2.10 makes explicit what is implicit in Canon 3.B(9) and provides that so long as a judge does not make statements, either public and non-public, that might reasonably be expected to affect the outcome or impair the fairness of a pending proceeding, "... a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter."

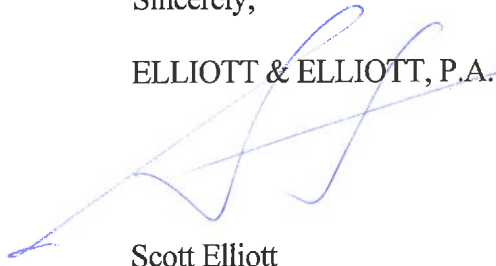
⁶ S.C. Code Ann. Section 58-3-260 cannot be read, as some have suggested, to prevent any comment whatsoever regarding a pending proceeding. To do so would prohibit a Commissioner from the mere mention of proceedings pending in the Public Service Commission, a patently absurd result.

⁷ The issues decided by the Public Service Commission are difficult enough for the "experts" to understand. To educate the public, the Commission would be well served to issue official summaries of its orders explaining their impact on ratepayers in plain English.

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Sincerely,

ELLIOTT & ELLIOTT, P.A.

A handwritten signature in blue ink, appearing to read 'Scott Elliott', is written over the text 'ELLIOTT & ELLIOTT, P.A.'.

Scott Elliott

SE/lbk

cc: All parties of record (Via Electronic Mail)